Supreme Court, U.S.
FILED

No. 00-1259 FEB 2 2001

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In The
Supreme Court of the United States

SORAYA NOLAND,

Petitioner,

v.

WILLIAM HENDERSON,
Postmaster General, United States Postal Service,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

I. **Whether a plaintiff can establish a claim for retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) by showing hostile work environment harassment?**

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 14.1(b) and Rule 29.1 of the Rules of Supreme Court of the United States.

1. Soraya Noland,
   Plaintiff - Appellee

2. William Henderson, Postmaster General,
   United States Postal Service,
   Defendant - Appellant

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit is reported at 2000 U.S. App. LEXIS 29485, and is attached in the appendix hereto.

The memorandum decision of the United States District Court for the Eastern District of Virginia has not been reported. It is reprinted and attached in the appendix hereto.

JURISDICTION

The United States District Court for the Eastern District of Virginia dismissed on summary judgment Petitioner's claims of gender and disability discrimination and her claim of workplace retaliation. With respect to Petitioner's retaliation, the district court found that the types of retaliatory harassment alleged by Petitioner did not constitute unlawful retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3, et seq. The district court, adhering to the Fourth Circuit's "ultimate employment decision" standard, ruled that Petitioner had failed to produce evidence sufficient to show that Respondent's conduct amounted to an adverse employment action.

On November 17, 2000, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court based upon the reasoning in the lower court's opinion. No petition for rehearing was sought.

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute involved is 42 U.S.C. § 2000e-3(a) which provides, "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . , or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . ."

STATEMENT OF THE CASE

Petitioner, Soraya Noland, has a Ph.D. in the field of ergonomics and has worked for Respondent, United States Postal Service (USPS), for over 15 years. Op. at 2; Appendix, p. 5. In 1992, Dr. Noland worked as a Human Factors Specialist, Program Manager, at a level of EAS-24. Id. At this time, the USPS underwent a nationwide reorganization, which resulted in the elimination of certain positions, including that of Dr. Noland. Those employees, including Dr. Noland, affected by the reorganization were to apply for new positions in USPS by completing certain forms and submitting those forms to their supervisors. None of the open positions were posted for public view. Appendix p. 5. In filling the new positions, the selecting officials were instructed to follow a procedure involving a placement panel. USPS had no mechanism to ensure that the selecting officials followed this procedure, however, and there is no indication that the selections were reviewed to determine whether EEO laws were followed. Appendix, p. 5.

After the reorganization, Dr. Noland remained employed at USPS continuing at a grade level EAS-24. Appendix, p. 6. In 1996, Dr. Noland learned that three higher level EAS-25 positions had been created in the 1992 reorganization that called for her qualifications and

experience and that had been filled with clearly less qualified males. Id. Believing that she had been subjected to discrimination based upon her sex, Dr. Noland took the appropriate steps to exercise her federal rights by filing an EEO complaint challenging the legality of her non-selection. Appendix, p. 7. USPS, however, did not respond constructively or appropriately to her charges of sex discrimination. Instead, her manager and other USPS employees embarked upon a concerted, continuing course of retaliation, which included nearly daily hostility and harassment. The retaliation against Dr. Noland included being denied career advancing detail assignments, being denied permission to attend management training seminars, not being allowed to act as a manager in her supervisor's absence, being publicly criticized about her work, having her abilities questioned in meetings with other employees, having job opportunities given to lesser qualified to males, and being subjected to public censure and humiliation. Id.

After pursuing her administrative remedies, Dr. Noland filed suit against USPS in the United States District Court for the Eastern District of Virginia alleging, among other things, that she was not promoted because of her sex and was retaliated against for filing her EEO complaint.[1] The district court granted summary judgment to USPS on all of Dr. Noland's claims and dismissed her case. App. 13. With respect to Dr. Noland's claim of retaliation, the court found that the types of harassment alleged by Dr. Noland did not amount to actionable unlawful retaliation under Title

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[1] Dr. Noland also alleged that she had been exposed to a hostile work environment because of her sex, that she had been discriminated against on account of a disability, and that USPS had engaged in a pattern or practice of discrimination based upon gender. Appendix, p. 4. Rose O. Hayes, a co-employee of Dr. Noland, was a co-plaintiff in the district court litigation. Dr. Hayes did not appeal the dismissal of her case and is not a party to this petition for certiorari.

VII.[2] Appendix, p. 12. The United States Court of Appeals for the Fourth Circuit affirmed the decision of the district court based upon the reasoning in the district court's opinion.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari to resolve the split in the circuits as to the proper standard for retaliation claims.

Employees who exercise their statutory rights to thwart workplace discrimination on the basis of sex or other protected characteristics and whose employers retaliate for these protected activities have recourse under federal law to remedy the effects of those retaliatory actions. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., prohibits an employer from retaliating against an employee who opposes discrimination in employment. The statute specifically provides, in relevant part, that "it shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice . . . , or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing . . ." 42 U.S.C. § 2000e-3(a).

For purposes of a Title VII retaliation claim, filing a complaint of discrimination, as Dr. Noland did, is a protected activity.[3] Congress intended that persons who file discrimination charges are to be fully protected from any

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[2] In finding that the type of harassment experienced by Dr. Noland did "not amount to retaliation or retaliatory harassment that give rise to a cause of action under Title VII" (Appendix, p. 12), the district court viewed the evidence through the lens of the "ultimate employment decision" standard followed in the Fourth Circuit for retaliation claims. See text, n. 6, infra.

[3] Smart v. Ball State Univ., 89 F.3d 437 (7th Cir.1996).

retaliation, both to secure the rights of the charging party and to avoid inhibiting others who might sue to implement the guarantees of Title VII.[4] As the Equal Employment Opportunity Commission ("EEOC") has emphasized "voluntary compliance with and effective enforcement of the anti-discrimination statutes depend in large part on the initiative of individuals to oppose employment practices that they reasonably believe to be unlawful, and to file charges of discrimination. If retaliation for such activities are permitted to go unremedied, it would have a chilling effect upon the willingness of individuals to speak out against employment discrimination or to participate in the EEOC's administrative process or other employment discrimination proceedings."[5]

In assessing claims of retaliation under Title VII, some circuits have adopted a restrictive view of what constitutes the type of harm that may give rise to a retaliation claim and have required a plaintiff to show that he or she suffered an "ultimate employment decision." The Fourth Circuit, which upheld the district court's decision to dismiss Dr. Noland's retaliation claim, is one of the circuits applying the "ultimate employment decision"standard for determining what qualifies as an adverse employment action for purposes of retaliation.[6] The Fifth and Eighth Circuits similarly have

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[4] Mead v. United States Fidelity & Guaranty Co., 442 F. Supp. 114, 132 (D.C. Minn. 1977).

[5] EEOC Compliance Manual, Retaliation at Section 8-I A, No. 915.003 (May 20, 1998).

[6] Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981) (stating "Title VII . . . has consistently focused on the question whether there has been discrimination in what could be characterized as ultimate employment decisions such as hiring, granting leave, discharging, promoting, and compensating.") See also, Boone v. Goldin, 178 F.3d 253, 255-56 (4th Cir. 1999) (stating that reassignment could not be a basis for a retaliation claim where plaintiff failed to allege any adverse employment action such as decrease in compensation, job title, level of responsibility, or opportunity for promotion.)

held that only ultimate employment decisions qualify as adverse actions for claims of retaliation under Title VII.[7]

Most circuits disagree with the Fourth, Fifth and Eighth Circuits, and have held that adverse actions that do not qualify as ultimate employment decisions still may give rise to liability for retaliation. These include the First,[8]

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[7] Burger v. Central Apt. Management, 168 F.3d 875, 878-89 (5th Cir. 1999) (stating that denial of a lateral transfer with the same job title, duties, wages, and benefits was not an "ultimate employment decision" and, therefore, insufficient to support a claim for retaliation); Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997), (where plaintiff alleged hostility from fellow employees, stolen tools, that her supervisors visited her at home, verbally threatened to fire her, reprimanded her, and placed her on "final warning", the court found these actions insufficient to support a claim for retaliation because they were not "ultimate employment decisions"); Messer v. Meno, 130 F.3d 130 (5th Cir. 1997), cert. denied, 119 S.Ct. 794 (1999) (plaintiff failed to allege adverse employment action where she claimed that she had been closely monitored and criticized after filing EEOC charge); Manning v. Metropolitan Life Ins. Co., 127 F.3d 686, 692 (8th Cir. 1997) (stating that hostility by supervisors did not rise to the level of an "ultimate employment decision."); Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (where plaintiff's staff was reassigned and replaced after she complained of her employer's alleged policy of giving deference to African-American employees, the court affirmed the grant of summary judgment for the employer because the lateral transfer was not an "ultimate employment decision."). Cf. Bernofsky v. Tulane Educational Fund, 2000 U.S. Dist. LEXIS 5561, (E.D. La. April 18, 2000) (stating that "this Court for one would welcome a revisiting of the issue by the Fifth Circuit.").

[8] Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge are covered by Title VII's anti-retaliation provision "listing employer actions such as demotions, disadvantageous transfers or assignments, refusals to promote, unwarranted negative job evaluations and toleration of harassment by other employees.") (internal citation omitted).

Second,[9] Sixth,[10] Seventh,[11] Ninth,[12] Tenth[13] and Eleventh[14] Circuits. In discussing the more lenient standard, the Eleventh Circuit in Wideman v. Wal-Mart noted that the ultimate employment decision standard is inconsistent with the plain language of 42 U.S.C. § 2000e-3(a), which makes it "unlawful [for an employer] to discriminate against any of his employees . . . because he has made a charge [of discrimination]. . . ." The court of appeals explained, "our plain language interpretation of 42 U.S.C. § 2000e-3(a) is consistent with Title VII's remedial purpose. Permitting employers to discriminate against an employee who files a

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[9] Wanamaker v. Columbian Rope Co., 108 F.3d 462, 466 (2d Cir. 1997) (stating that Title VII does not "define adverse employment action solely in terms of job termination or reduced wages and benefits, and that less fragrant reprisals by employers may indeed be adverse."); Richardson v. New York State Dept. of Correctional Service, 180 F.3d 426, 447 (2d Cir. 1999) (reversing an employer's motion for summary judgment where employee sufficiently alleged that she was the target of abusive treatment from her co-workers after filing her lawsuit.).

[10] Morris v. Oldham County Fiscal Court, 201 F.3d 784, 792 (6th Cir. 2000).

[11] Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996) (stating that "nothing indicates why a different form of retaliation – namely, retaliating against a complainant by permitting her fellow employees to punish her for invoking her rights under Title VII – does not fall within the statute. The law deliberately does not take a 'laundry list' approach to retaliation, because unfortunately its forms are as varied as the human imagination will permit.");

[12] Fielder v. UAL Corporation, 218 F.3d 973, 985 (9th Cir. 2000) (stating that "the interpretation of an adverse employment action as expressed by the Courts of Appeals of the First, Seventh and Tenth Circuits is consistent with the plain language of 42 U.S.C § 2000e-3, which makes it 'unlawful to discriminate against any . . . employees.'").

[13] Gunnell v. Utah Valley State College, 152 F.3d 1253, 1264 (10th Cir. 1998) (stating that "co-worker hostility or retaliatory harassment, if sufficiently severe, may constitute 'adverse employment action' for purposes of a retaliation claim.").

[14] Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1455 (11th Cir. 1998) (stating that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of an 'ultimate employment decision.'").

charge of discrimination so long as the retaliatory discrimination does not constitute an ultimate employment action, could stifle employees' willingness to file charges of discrimination."[15]

The Seventh Circuit similarly has noted that there is "nothing in the law of retaliation that restricts the type of retaliatory act that might be visited upon an employee who seeks to invoke her rights by filing a complaint" and acknowledged that "adverse actions can come in many shapes and sizes."[16] Thus, in Knox v. Indiana, the court of appeals opined that employment actions, even less harmful than the conduct to which Dr. Noland was subjected, may give rise to a viable retaliation claim:

> No one would question the retaliatory effect of many actions that put the complainant in a more unfriendly working environment: actions like moving the person from a spacious, brightly lit office, to a dingy closet, depriving the person of previously available support services (like secretarial help or a desktop computer), or cutting off challenging assignments. . . . The law deliberately does not take a "laundry list" approach to retaliation because, unfortunately, its forms are as varied as the human imagination will permit.[17]

The Equal Opportunity Commission has adopted an even broader view of Title VII's retaliation provisions. The Commission disagrees with those courts, like the Fourth Circuit, that have held the retaliation provisions apply only to ultimate employment decisions or actions that materially

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15 Wideman, 141 F.3d at 1456.

16 Knox v. Indiana, 93 F.3d 1327, 1334 (7th Cir. 1996)

17 Knox, 93 F.3d at 1334.

affect the terms, conditions, or privileges of employment. In the Commission's view, these court rulings are unduly restrictive because an employee should be able to challenge retaliatory treatment no matter what the impact may be.[18] The Commission bases its position on both the statutory language and policy considerations underlying Title VII. Compared to the general anti-discrimination provisions of Title VII, which make it unlawful to discriminate with respect to an individual's "terms, conditions, or privileges of employment," the language of Title VII's anti-retaliation provision is exceptionally broad. The statutory language for retaliation specifies no qualifiers on the term "to discriminate"; the language prohibits any discrimination that is reasonably likely to deter protected activity. Thus, according to the Commission, "a violation will be found if an employer retaliates against a worker for engaging in protected activity through threats, harassment in or out of the workplace, or any other adverse treatment that is reasonably likely to deter protected activity by that individual or other employees."[19]

This Court should review this case in order to resolve the split among the circuits and to set forth a clear standard for proving retaliation claims. The different standards adopted by the courts for establishing what constitutes wrongful retaliation under Title VII creates clear inequities in the protections accorded by the civil rights laws and the enforcement of those laws. For example, had Dr. Noland been working in Chicago or Atlanta, instead of Northern Virginia, and proceeded with her Title VII retaliation claim in a district court in the Seventh or Eleventh circuits rather than in the Eastern District of Virginia, her claim for retaliatory harassment undoubtedly would have survived summary judgment under the standard enunciated in

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[18] See EEOC Compliance Manual, Retaliation at Section 8-I D.3, No. 915-003 (May 20, 1998).

[19] Id.

Wideman or Knox. Whether or not an employee may proceed in court with a retaliation claim should not depend upon the location where an employee may work or file suit.

II. Adverse employment actions need not qualify as "ultimate employment decisions" in order to constitute retaliation.

The Fourth Circuit has held that, in order to establish a prima facie case of retaliation, a plaintiff need show that (1) she engaged in protected activity, (2) the employer took an adverse employment action against her, and (3) a causal connection existed between the protected activity and the adverse action. See, e.g. Hopkins v. Baltimore Gas and Elec. Co., 77 F.3d 745,754 (4th Cir. 1996); Carter v. Bell, 33 F.3d 450 (4th Cir. 1994) (citing Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989).

The district court based its dismissal of Dr. Noland's retaliation claim upon the determination that the harassing conduct of which she complained did not amount to an "adverse employment action." Appendix, p. 11. In so holding, the district court misapprehended the nature of the law, which contrary to the Fourth Circuit's standard, should not require a plaintiff to demonstrate that he or she suffered an "ultimate employment decision." The heightened standard that has been adopted in the Fourth Circuit is contrary to the rule applied in a majority of circuits. See n. 6-14, supra.

The heightened standard, moreover, runs counter to the primary purpose of the statute, which, as this Court recognized in Robinson v. Shell Oil Co., 519 U.S. 337, 117 S.Ct. 843, 848 (1997), is to "[m]aintain[] unfettered access to statutory remedial mechanisms." In Shell, this Court, in a unanimous ruling, reversed the Fourth Circuit's restrictive view that former employees were not covered by the anti-retaliation provisions of Title VII and broadly interpreted the term "employees" to include "former employees." More

importantly, a "negative job reference" -- not an ultimate employment decision -- gave rise to the retaliation claim at issue in the Shell case. Similarly, in this case, Dr. Noland is seeking to reverse the Fourth Circuit's use of the restrictive ultimate employment decision standard and reaffirm this Court's broad interpretation of Title VII's anti-retaliation provisions to include employees who have suffered adverse employment actions, like negative references, that do not rise to the level of an "ultimate employment decision."

Denying a claim for retaliatory harassment as the district and appeals courts did in Dr. Noland's case, also, is not in accord with the import of this Court's decisions in Burlington Indus. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275 (1998). In these cases, the Court recognized that an employer may be vicariously liable to an employee for an actionable hostile environment where the conduct is "severe or pervasive" even though there may be no "tangible employment action." Ellerth, 118 S.Ct. at 2264.

In light of the reasoning in both Ellerth and Faragher, the Sixth Circuit has held that a plaintiff may state a proper claim of retaliation where the employee, like Dr. Noland, was subjected to workplace harassment for invoking her rights under Title VII. See Morris v. Oldham County Fiscal Court, 201 F.3d 784, 791 (6th Cir. 2000). In Morris, the plaintiff brought a Title VII action similar to that of Dr. Noland, claiming that she was subjected to sexual harassment and retaliatory harassment by her supervisor. Id. at 786. Prior to filing suit, Morris had filed a sexual harassment complaint against her supervisor for his inappropriate conduct. Id. at 787. Thereafter, Morris contended that the supervisor began giving her the "cold shoulder" and became overly critical of her work. Id. After additional complaints, Morris was transferred to another office location, but her former supervisor continued to visit her new work location in order to harass her. Morris alleged that the supervisor sat in his truck outside of her office

making faces at her; followed her home on one occasion; destroyed a television she occasionally watched; and threw roofing nails onto her home driveway on several occasions. Id. The district court held that Morris had not been subjected to any adverse employment action because she had not experienced a decrease in compensation, job title, level of responsibility or opportunity for promotion. Accordingly, the district court rejected her retaliation claim. Id at 788. The Sixth Circuit reversed.

The Sixth Circuit reasoned that an adverse employment action is not the only type of retaliation cognizable under Title VII. Rather, in the wake of Ellerth and Faragher, the court of appeals explained that a claim for retaliatory harassment by a supervisor should be actionable under a "hostile environment" theory:

> The Supreme Court has made it clear that severe or pervasive harassment by a supervisor based on an individual's sex can constitute "discrimination" under 42 U.S.C § 2000e-2(a)(1), which forbids an employer "to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex." See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998). It naturally follows that under Ellerth, severe or pervasive supervisor harassment that is engaged in because an individual "has opposed any practice made an unlawful employment practice by" Title VII also can constitute "discrimination" under 42 U.S.C. § 2000e-3(a).

201 F.3d at 791-92.

Recognizing that a cognizable action may be stated for retaliatory harassment where an employee opposes any unlawful employment practice, the Sixth Circuit modified the traditional prima facie case for a retaliation claim to add that a plaintiff must show either that the defendant took adverse action against *the plaintiff or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor.* Id. at 792.[20] This formulation permits a plaintiff who has been a victim of retaliatory harassment to seek recovery under Title VII even if the plaintiff cannot establish what the courts traditionally have termed an ultimate employment decision.

In line with the reasoning of the Sixth Circuit in Morris, therefore, the standard for a retaliatory harassment claim should be the same as that for a hostile work environment as enunciated by this Court in Ellerth and Faragher. There is no basis to impose, as did the district court and the Fourth Circuit in Dr. Noland's case, a heightened standard for establishing what constitutes illegal retaliation than for establishing what constitutes a hostile work environment. Had the district court and the Fourth Circuit recognized a claim for retaliatory, hostile work environment harassment, Dr. Noland's claim for retaliation would not have been dismissed and her case would have proceeded to a trial on the merits.

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20 "[A] plaintiff must now prove that: (1) she engaged in activity protected by Title VII; (2) this exercise of protected rights was known to defendant; (3) defendant thereafter took adverse employment action against the plaintiff, or the plaintiff was subjected to severe or pervasive retaliatory harassment by a supervisor; and (4) there was a casual connection between the protected activity and the adverse employment action or harassment." Morris, 201 F.3d at 792.

CONCLUSION

In rendering its decisions in Ellerth and Faragher, this Court clarified the standards for holding an employer liable for the sexual harassment of an employee. The Court, however, did not clarify the standards for holding an employer liable for retaliation against an employee for opposing harassment or discrimination. The courts of appeal have taken varied approaches to this issue, which has created inconsistent standards and judicial outcomes depending upon the jurisdiction in which a plaintiff may file suit. This inconsistency is becoming especially disruptive to the fair resolution of retaliation claims, as the number of such claims continues to grow dramatically. [21]

Therefore, review by this Court of the Fourth Circuit's decision dismissing Dr. Noland's retaliation claim is warranted and Dr. Noland's Petition for Certiorari should be granted.

Respectfully submitted,

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[21] There has been a "dramatic" rise in the number of retaliation charges filed with the EEOC. Spriggs, *Representing Plaintiffs in Title VII Actions*, Vol. 1, at 7-5 (Panel Publications 1999). See also Charge Statistics from the U.S. Equal Opportunity Commission, (visited December 29, 2000) <http://www.eeoc.gov/stats/charges.html> (reflecting an increase in Title VII retaliation charges from 14.5% in 1992 to 24.7% in 2000).

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-1207

SORAYA NOLAND,
Plaintiff - Appellant,

and

ROSE O. HAYES,
Plaintiff,

versus

WILLIAM J. HENDERSON,
Postmaster General, United States Postal Service,
Defendant - Appellee.

Appeal from the
United States District Court for the
Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge. (CA-99-1027-A)

Submitted: **October 31, 2000**
Decided: **November 17, 2000**
Entered: **November 17, 2000**

Before WIDENER, MICHAEL, and
TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jonathan R. Mook, DiMURO, GINSBERG & MOOK, P.C., Alexandria, Virginia, for Appellant. Helen F. Fahey, United States Attorney, Arthur E. Peabody, Jr., Assistant United States Attorney, Alexandria, Virginia; Thomas J. Marshall, Stephan J. Boardman, UNITED STATES POSTAL SERVICE, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

Soraya Noland appeals from the district court's order granting summary judgment in favor of the U.S. Postal Service in her employment discrimination action. Our review the record, the district court's opinion, and the parties briefs discloses no reversible error. Accordingly, we affirm on the reasoning of the district court. See Noland v. Henderson, No. CA-99-1027-A (E.D. Va. Jan. 28, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SORAYA NOLAND, ROSE O. HAYES, Plaintiffs, v. WILLIAM HENDERSON, Defendant.	)) Civil Action No. 99-1027-A)))))	**FILED** **JAN 28 2000** **CLERK, US DISTRICT COURT** **ALEXANDRIA VIRGINIA**

Entered: January 28, 2000

ORDER

This matter is before the court on defendant's motion for summary judgment. Upon consideration of the parties' submissions and for the reasons stated in the Memorandum Opinion filed this day, it is herby

ORDERED that:

1. Defendant's motion for summary judgment is GRANTED; and

2. This case is DISMISSED without prejudice.

\s\ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
January 28, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

SORAYA NOLAND,)
ROSE O. HAYES,) Civil Action No. 99-1027-A
Plaintiffs,)
)
v.)
)
WILLIAM HENDERSON,)
Defendant.)

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Memorandum Opinion

Plaintiffs allege against their employer claims of gender discrimination and retaliation in violation of Title VII, and disability discrimination in violation of the Rehabilitation Act. In particular, in Count I, plaintiffs claim defendant violated 42 U.S.C. § 2000e by exposing them to a hostile environment because of their sex and because they engaged in EEO activity in violation of Title VII. In Count II, Plaintiffs claim that defendant's actions have caused them each to loose a promotion because of their sex, violating 42 U.S.C. §2000e-2. In Count III, plaintiffs raise a claim of unlawful retaliation under 42 U.S.C. §2000e-3. Count IV raises a claim of pattern or practice of discrimination based upon gender, and in Count V, plaintiffs allege that defendant's actions constitute disability discrimination in violation of the Rehabilitation Act, 29 U.S.C. §791.

Plaintiffs allege in all counts that as a result of defendant's actions, they sustained direct and consequential damages, including, emotional pain, mental anguish, humiliation and embarrassment, damage to their professional reputations and damage to their reputations in the

community. Defendant has moved for summary judgment on all counts. For the reasons stated herein, defendant's motion for summary judgment is granted, and the case is dismissed with prejudice.

Factual Background

Plaintiff Hayes began her employment with the Postal Service in 1980, and plaintiff Noland in 1985. In 1992, plaintiff Hayes worked as Program Manager, Ergonomics, at a grade level of EAS-24, and plaintiff Noland as a Human Factors Specialist, Program Manger, also at a level of EAS-24. At this time, the Postal Service underwent a nation-wide reorganization, which resulted in the official elimination of certain positions, including those of plaintiffs. Those employees affected by the reorganization had to apply for new positions in the United States Postal Service by filling out certain forms and turning those forms into their supervisors. The executive level positions were filled by vice presidents in the postal service, and then the newly appointed executives hired the employees whom they would supervise.

To accomplish filling the positions under them, the executives were given descriptions and requirements for the open positions, as well as forms completed by employees of the predecessor organizations and forms completed by other employees who had specifically requested consideration for the various positions they were filling. The executives were also free to choose from former postal employees who did not fall into either of these categories but whom they believed were qualified. None of the open positions were posted for public view. While in filling the positions, the selecting officials were instructed to follow a procedure involving a placement panel, there was no mechanism to assure that the selecting officials followed this procedure, nor is there any indication that the selections were reviewed to determine whether EEO laws were followed.

Mr. Elyea was appointed the manager of the Systems/Process Integration Unit. As such, he was the executive in charge of hiring employees to fill three Systems Process Engineer positions at a level of EAS-25. Mr. Elyea did not consider either plaintiff for any of these positions despite knowing that they had a background in ergonomic, and selected Leo Vogel, Roger Herreras, and David Aubin to fill the open EAS-25 slots. The relative qualifications of these employees for the System Process Engineer positions, as compared to those of plaintiffs, are in dispute.

After the reorganization, plaintiffs were employed in the Human Resources Department, where they worked until 1996. Effective March 30, 1996, their functions in the Human Resources were reassigned to the Engineering Department, and therefore fell under Mr. Elyea. Prior to plaintiff Noland's beginning her position under Mr. Elyea, on March 28, 1996, through counsel, she wrote to the vice president of the Engineering Department complaining that Mr. Elyea had created a sexually hostile atmosphere. In particular, she accused him of relating intimate details of an affair that she had with Mr. Elya some twelve years earlier. Plaintiff Noland was detailed to the Delivery and Customer Services unit until the postal service completed an internal investigation into her allegations of sexual harassment. Her detail was terminated on August 30, 1996, after the postal service concluded that the allegations were not substantiated.

Following plaintiffs' reassignment to the Engineering unit, Mr. Elyea appointed Mr. Aubin to serve as the group leader for Human Factors Engineering, and in this capacity he supervised plaintiffs. According to plaintiffs, it was after they began to work under Mr. Aubin, in August of 1996, that they learned he had held the position of Systems Process Engineer, at a level of EAS-25, since the Postal Service's restructuring in 1992. Plaintiffs contend that in 1992, they were both more qualified than Mr. Aubin for the Systems Process Engineer position, which would have been a promotion for them had either of them received it in 1992.

Plaintiffs contend that in October 1997, over a year after learning of Mr. Aubin's title and grade level, they learned that Leo Vogel and Roger Herreras had also been appointed to slots of the same job title and grade level that Mr. Aubin held, i.e., Systems Process Engineer, during the restructuring in 1992. Plaintiffs contend that in 1992, they were also both more qualified for the EAS-25 positions than these two men.

On October 4, 1996, both plaintiffs contacted an Equal Employment Office ("EEO") counselor, initiating EEO proceedings based on gender discrimination because they were not notified of and considered for the three Systems Process Engineer positions in 1992. They filed formal complaints on February 18, 1997. They contend that following these complaints, plaintiffs were subjected to a "continuing course of retaliation and harassment by Mr. Aubin and Mr. Elyea."

In particular, with respect to plaintiff Noland, allegations of harassment and retaliation include the following: Plaintiff Noland was denied the opportunity to go on career-advancing detail assignments on two occasions; she was not permitted to attend various management training seminars; and she was not allowed to act as manager in Mr. Aubin's absence. Further, plaintiffs allege that Mr. Elyea publicly criticized her work and questioned her abilities in meetings with other employees. Plaintiffs contend that males were given the opportunities denied to plaintiff Noland, even in some cases, those with less experience and a lesser grade, and that males were not subjected to the public censure and humiliation that plaintiff Noland was. Plaintiffs also assert that in retaliation for filing an EEO complaint, defendant refused to reasonably accommodate a temporary eye infection that Plaintiff Noland suffered soon after her reassignment to Engineering.

With respect to retaliation and harassment inflicted against plaintiff Hayes, plaintiffs allege that Mr. Elyea removed her from an ergonomics task force, reduced her job responsibilities by requiring that any requests for her

services from outside the department pass through Mr. Aubin and by announcing that the "medical ergonomics" function did not exist, downgraded her performance review, and denied her request for a position upgrade. Plaintiffs also allege that Mr. Aubin denied plaintiff Hayes's request to attend an occupational health and safety course at Harvard School of Public Health and that he discontinued payment of her professional certification fees, refused her the use of a corporate credit card for company travel, and refused all of her 1998 applications for professional courses.

Furthermore, plaintiff Hayes submits that she was denied an appropriate physical environment to perform her work, and that in retaliation for her EEO activity, she did not receive reasonable accommodation for a shoulder injury caused by an on–the-job accident. Particularly, plaintiff Hayes contends that she was not given assistance in unpacking boxes, that she was not given a left-handed keyboard and mouse, and that she was given jobs that exacerbated the injury, such as ones requiring a lot of typing.

Plaintiff Hayes also claims that a disciplinary letter of warning issued to her in 1997, in lieu of a seven day suspension, was another form of retaliation and harassment. The letter charged her with disobeying several orders given to her in the course of her duties. Among other things, it reprimanded her for not removing from her work space a sign that read, "Don't ask me, ask the white man," even after she was told to do so. It also criticized her for disobeying orders not to unpack boxes without assistance, and blamed her for re-injuring her shoulder at expense to the postal service. Plaintiff Hayes disputes the legitimacy of the complaints that form the basis of the 1997 letter, contending that she did not receive many, if not all, of the requests to remove the sign before receiving the letter. She also denies disobeying the orders not to unpack and criticizes the Postal Services for not sufficiently accommodating her shoulder injury.

Plaintiff Hayes submits further that even after she was transferred from the supervision of Mr. Aubin, he continued to harass her and retaliate against her by making unsolicited communications to her new managers that she has a history of re-injuring herself and of not following orders.

In addition, plaintiffs allege that other acts by defendant either constitute gender discrimination or were done in retaliation for their EEO activity. These include, for example, a claim that defendant allowed a sexually hostile environment to fester in the engineering department by not stifling negative and derogatory reactions of male workers when they learned that plaintiffs were to be transferred to their department in 1996, and a claim that defendant abolished the Human Factors Engineering group to prevent both plaintiffs from obtaining management positions there.[1]

Discussion

Count I

In Count I, plaintiffs assert that defendant's actions have exposed plaintiffs to a hostile environment because of

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[1] In sorting out plaintiffs' allegations, it is somewhat difficult to determine precisely which facts are alleged to pertain to retaliation and harassment and which facts totally pre-date any type of EEO complaint, and therefore cannot constitute retaliation and pertain merely to a claim for hostile environment. It is also somewhat difficult to determine whether certain allegations pertain only to conduct that happened long before the October 4, 1996 contact with an EEO counselor. This confusion is heightened by plaintiff's admitting, without much clarification, that "some of the allegations in plaintiff's EEO complaints were not timely and will not be pursued if this case goes to trial." Therefore, this factual background does not always make the fine distinctions among retaliation, harassment, and hostile environment allegations that may exist. However, as needed to explain and justify the court's ruling the necessary distinctions are made in the discussion section below.

their sex.[2] Defendant argues that plaintiffs' allegation of a hostile environment, aside from those more appropriately considered under retaliation, are untimely.[3] Defendant's position is well taken. Pursuant to 29 C.F.R. §§1614.105(a)(1), a federal employee must initiate contact with an EEO counselor within 45 days of the date of the matter alleged to be discriminatory. Plaintiff's allegations, solely related to hostile environment, appear as defendant suggest to be twofold: First, plaintiff Noland asserts that just before she was transferred to Engineering, Mr. Elyea had related details about her affair with him several years earlier, and this was the subject of a March 28, 1996 letter to the vice president of the Engineering Department. Second, plaintiffs allege that in a February 1996 meeting, male staff members expressed negative and derogatory reactions about the addition of plaintiffs to their unit. Neither of these incidents occurred within, or even nearly within, the requisite timeframe preceding their October 4, 1996 EEO contact.[4] As such, defendant's motion for summary judgment as to Count I is granted.

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[2] Plaintiffs also claim that defendant's actions have exposed plaintiffs to a hostile environment because they engaged in EEO activity in violation of Title VII. To the extent the allegations pertain to such retaliation, they are addressed in the discussion of Count III.

[3] In their opposition to defendant's motion for summary judgment at pages 19-20, plaintiffs raise a number of allegations that they assert are claims of hostile environment and were timely asserted to an EEO counselor. These allegations of "general harassment," such as giving plaintiff Noland a broken laptop and refusing her request to have group meetings, among several others, raise retaliation claims rather than sexual harassment claims, and therefore, are incorporated in the discussion of more similar allegations addressed under Count III below.

[4] Evidence indicates that the March 28, 1996 letter was not considered EEO activity. There is no dispute that plaintiffs understood that by May 1996.

Count II

In its second count, plaintiffs assert that defendant's actions have caused a loss of promotion for plaintiffs because of their sex in violation of Title VII. Defendant argues that this matter is also barred by the time requirement of 29 C.F.R. §§1614.105(a)(1).

According to plaintiff's allegations, the promotion in dispute occurred in 1992, when they were unlawfully passed over by Mr. Elyea for placement in one of the three Systems Process Engineer positions at a level of EAS-25. The EEO activity in which they complained of this event was not initiated by either plaintiff until October 1996. While the plaintiffs maintain that they were not aware of the EAS-25 positions until August 1996, the court finds it inconceivable that for four years these plaintiffs remained unaware of a promotion that they now allege had fit their 1992 qualification so notably. Furthermore, even assuming the EEO activity was timely, there is simply no evidence that in overlooking plaintiffs in the task of filling these three EAS-25 positions, there was any discriminatory intent on the part of any employee of defendant. As such, plaintiffs have no basis to support a claim under 42 U.S.C. § 2000e-2, and defendant's motion for summary judgment on Count II is granted.

Count III

Defendant's motion for summary judgment as to the retaliation count is also well taken. First, there is no evidence of any adverse employment action. Furthermore, the type of actions alleged, e.g., criticizing plaintiffs' work; denying their requests for detail assignments, advanced training opportunities, and the chance to serve as acting manager in Mr. Aubin's absence; issuing to plaintiff Hayes the 1997 letter of warning, and her removal from the ergonomics task force, as well as defendant's refusal to pay

her certification fees and provide her with a corporate credit card, do not amount to retaliation or retaliatory harassment that can give rise to a cause of action under Title VII. Similarly, the manner the defendant dealt with both plaintiff Hayes' shoulder injury and plaintiff Noland's temporary eye condition, is not actionable under Title VII. Indeed, aside from the bare allegations in plaintiffs' affidavits, there is no evidence to show that defendant's conduct in these matters was anything less than satisfactory, much less done with intent to discriminate on the bases of gender and retaliate for the filing of an EEO complaint. As such plaintiffs cannot make out a Title VII claim under 42 U.S.C. §2000e-3. Count III is therefore dismissed.

Count IV

Plaintiffs initially raised a claim under 42 U.S.C. §2000e-6. However, in answer to defendant's motion for summary judgment on this count, plaintiffs indicate that they voluntarily dismiss this claim. Accordingly, Count IV is hereby dismissed.

Count V

Plaintiffs final count is under the Rehabilitation Act, alleging that defendant failed to provide reasonable accommodation for covered disabilities. In the case of plaintiff Noland, the alleged disability is a temporary eye infection from which she has since recovered. Furthermore, she experienced no adverse employment actions in conjunction with the eye condition. As such, plaintiff Noland does not make out an actionable Rehabilitation Act claim.

Similarly, while the extent to which plaintiff Hayes' injuries are covered by the Rehabilitation Act and the extent to which defendant reasonably accommodated plaintiff Hayes are in dispute, the evidence indisputably indicates that

any accommodation problems have resolved themselves. Indeed, plaintiff is no longer in her former position under Mr. Aubin but rather is working in a different section of the Engineering Department. Plaintiff suffered no adverse employment action and no loss in pay. Accordingly, granting relief under the Rehabilitation Act would be inappropriate. Count V, as to both plaintiffs, is also dismissed.

Conclusion

Defendant's motion for summary judgment is granted, and the case is dismissed without prejudice.

\s\ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.
United States District Judge

Alexandria, Virginia
January 28, 2000

Supreme Court, U.S.
FILED
APR 3 2001

(2)

No. 00-1259

In the Supreme Court of the United States

SORAYA NOLAND, PETITIONER

v.

WILLIAM HENDERSON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below properly granted summary judgment against petitioner's Title VII retaliation claim on the ground that petitioner presented no evidence regarding the existence of a retaliatory motive.

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In the Supreme Court of the United States

No. 00-1259

SORAYA NOLAND, PETITIONER

v.

WILLIAM HENDERSON, POSTMASTER GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 238 F.3d 413 (Table). The opinion of the district court (Pet. App. 3-13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 2000. The petition for a writ of certiorari was filed on February 2, 2001. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was employed as a Human Factors Specialist, EAS level 24, by the United States Postal

Service (USPS) in 1992 when the USPS undertook a significant restructuring. As a part of that reorganization, certain positions were officially eliminated and those job functions were transferred to other offices within USPS. Affected employees applied for new positions by submitting certain forms to their supervisors. Those employees did not apply for specific jobs, but rather were assigned on the basis of such factors as prior relevant experience, as detailed in the forms provided to supervisors. As a result of this process, petitioner was assigned to a new position at the same pay level and with similar responsibilities as in her previous job. Pet. App. 5-6.

During the restructuring, three EAS level 25 positions were created. Pet. App. 6. These "systems process engineer" positions required substantial practical experience with postal operations in the field. C.A. App. 88. The vice president of engineering instructed the engineering department manager, Larry Elyea, to "recruit heavily from field resources" in filling those positions, *id.* at 64, and Elyea accordingly "look[ed] for field expertise and knowledge in the hands-on distribution in the field," *id.* at 69. One of the positions was offered to a female director of operations in the field but she did not take it. *Id* at 70. Ultimately, all three systems process engineer positions were filled by male employees with a minimum of four years' field operational experience. *Id.* at 94- 112. Petitioner did not have similar "hands-on" engineering experience in the field and, accordingly, was not considered for one of the EAS 25 positions. *Id.* at 224-225.

In 1996, there was another, more limited reorganization. Effective March 30, 1996, petitioner's job functions were reassigned to the Engineering Department under Elyea. Pet. App. 6. Petitioner had stated to

upper management that she did not desire that transfer because Elyea had, in her perception, created a sexually hostile atmosphere by divulging details to coworkers of an affair the two had had some years prior. *Ibid.* At petitioner's request, she was temporarily assigned to the Delivery and Customer Services Department until August 30, 1996, when the USPS made its final determination that petitioner's allegations of a sexually hostile atmosphere were not substantiated. *Ibid.* Following that determination, petitioner went to work in the Engineering Department. While assigned to that department, petitioner was supervised by David Aubin, whom Elyea named as the group leader for Human Factors Engineering. Aubin was one of the three employees offered the EAS-25 positions in 1992. *Ibid.* Petitioner contends that she did not learn of the existence of the systems process engineer positions prior to her transfer to Aubin's supervision.

On February 18, 1997, petitioner and a coworker, Rose Hayes, filed formal Equal Employment Opportunity (EEO) complaints under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 7. In those complaints, petitioner and Hayes alleged sex discrimination because they were not notified of and considered for the three systems process engineer positions in 1992. Petitioner also complained generally of a continuing pattern and practice of sexual discrimination and harassment and of other allegedly discriminatory conduct, including exclusion from certain management training seminars, refusal to allow her to act as temporary manager in her supervisor's absence, and denial of two requests for special details. C.A. App. 171-174.

In subsequent EEO complaints, petitioner asserted that her supervisors retaliated against her for filing the

initial complaint. The allegedly retaliatory acts included additional refusals of management training, temporary management duties, and detail requests; denial of adequate accommodation for a temporary eye affliction; transfer of petitioner's workstation such that it was within view of the outside of Elyea's office; and completion of her personal achievement plan in a manner of which she did not approve. Pet. 3; Pet. App. 7-8.

2. Petitioner and Hayes then filed complaints in federal district court, alleging four claims of sex discrimination and retaliation under Title VII and one claim of disability discrimination under Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791 (1994 & Supp. IV 1998). Pet. App. 4. The United States Attorney's Office moved for summary judgment. One of the arguments in the motion was that the actions of which petitioner complained did not rise to the level of ultimate employment decisions and therefore were not cognizable as retaliation under Title VII. The district court granted the motion for summary judgment with respect to four of the claims and accepted the plaintiffs' withdrawal of the fifth. *Id.* at 9-13.

With respect to petitioner's retaliation claim—the only claim presented here—the court granted summary judgment for two reasons. First, the court held that "there is no evidence of any adverse employment action" because the "type of actions" that petitioner challenged "do not amount to retaliation or retaliatory harassment that can give rise to a cause of action under Title VII." Pet. App. 11-12. In addition, the court concluded that "there is no evidence to show that defendant's conduct in these matters was anything less than satisfactory, much less done with intent to * * * retaliate for the filing of an EEO complaint." *Id.* at 12.

3. Petitioner appealed the district court's decision. Following review of this Court's decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998) and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), the government in the court of appeals did not rely on an "ultimate employment decision" standard, but instead argued that petitioner's allegations did not constitute tangible employment actions. The Fourth Circuit affirmed summarily on the reasoning of the district court in an unpublished, per curiam opinion. Pet. App. 1-2.

ARGUMENT

The decisions below are correct and did not endorse the "ultimate employment decision" standard in determining what constitutes an adverse employment action for retaliation claims under Title VII. Moreover, a recent Fourth Circuit decision makes clear that the court does not follow the "ultimate employment decision" standard. In any event, the courts below also granted summary judgment because there was no evidence that the adverse actions that petitioner alleges were done "with intent to * * * retaliate for the filing of an EEO complaint." Pet. App. 12. Petitioner does not challenge this independent ground in her petition, so review of the "adverse employment action" determination below would not affect the ultimate outcome in this case. Further review by this Court is not warranted.

1. Section 2000e-3 provides that it "shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because [the employee] has made a charge * * * under this

subchapter."[1] In order to make out a prima facie case of retaliation under Section 2000e-3, a plaintiff must show (1) that she engaged in statutorily protected activity, (2) that she suffered an adverse employment action, and (3) that there is a causal link between the protected expression and the adverse action. See *Hopkins* v. *Baltimore Gas & Elec. Co.*, 77 F.3d 745, 754 (4th Cir.), cert. denied, 519 U.S. 818 (1996).

Petitioner argues that the Court should grant certiorari to resolve a split among the courts of appeals regarding the proper standard to be applied in determining what is an actionable "adverse employment action" in Title VII retaliation claims. Contending that the Fourth Circuit follows the more "rigorous approach" that a plaintiff must have suffered from an "ultimate employment decision" such as hiring, discharging, promoting, and compensating (Pet. 5), petitioner argues that her case would have been decided differently in a circuit that recognizes that other types of employer conduct may give rise to retaliation claims. Pet. 9-10.

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[1] The courts below treated petitioner's claim as if it had been brought directly under 42 U.S.C. 2000e-3. Pet. App. 4, 12. However, it is actually 42 U.S.C. 2000e-16 (1994 & Supp. IV 1998) that governs the Title VII claims brought against USPS in this case. That provision states that "[a]ll personnel actions affecting employees * * * in the United States Postal Service * * * shall be made free from any discrimination based on race, color, religion, sex, or national origin." Whatever differences may exist between these two statutes, see, *e.g.*, note 3, *infra*, were not explored in the courts below, which treated this as a claim under Section 2000e-3. We likewise address the Section 2000e-3 case law, but note that the potential (but unexplored) differences in the application of Section 2000e-16 make this case a poor vehicle to consider issues raised under either statutory provision.

The courts of appeals have articulated different standards for what types of employer conduct are actionable under 42 U.S.C. 2000e-3. In *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 707, cert. denied, 522 U.S. 932 (1997), the Fifth Circuit held that Title VII retaliation claims are intended to address only "ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions." *Mattern* defined ultimate employment decisions as acts "such as hiring, granting leave, discharging, promoting, and compensating." *Ibid.* The Fifth Circuit continues to adhere to this view.[2] See *Thomas* v. *Texas Dep't of Criminal*

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[2] Petitioner also contends that the Eighth Circuit allows only Title VII retaliation claims that challenge ultimate employment decisions. See Pet. 6 n.7. But one of the cases cited for that proposition—*Manning* v. *Metropolitan Life Insurance Co.*, 127 F.3d 686 (8th Cir. 1997)—stated that a retaliation claim would lie for a "tangible change in duties or working conditions that constituted a material employment disadvantage," *id.* at 692, and recognized an earlier case holding that "negative references to potential employers constituted sufficient adverse action to state a retaliation claim." *Ibid.* (citing *Smith* v. *St. Louis Univ.*, 109 F.3d 1261, 1266 (8th Cir. 1997)). Another Eighth Circuit opinion held that "reduction of duties, disciplinary action and negative personnel reports, as well as required remedial training, constituted adverse employment action" in a retaliation claim. *Kim* v. *Nash Finch Co.*, 123 F.3d 1046, 1060 (1997). Thus, the Eighth Circuit allows retaliation claims that challenge conduct in addition to hiring, granting leave, discharging, promoting, and compensating decisions. Moreover, the Eighth Circuit cases that petitioner cites all predate this Court's decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998). As petitioner discusses, some courts have reexamined what constitutes an adverse employment action in retaliation claims in light of *Ellerth* and *Faragher*. See Pet. 11-13

Justice, 220 F.3d 389, 394 n.2 (5th Cir. 2000) (quoting *Mattern*, 104 F.3d at 707). Other courts of appeals have held that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions." *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998); see also *Wyatt* v. *City of Boston*, 35 F.3d 13, 15-16 (1st Cir. 1994); *Wanamaker* v. *Columbian Rope Co.*, 108 F.3d 462, 466 (2d Cir. 1997); *Knox* v. *Indiana*, 93 F.3d 1327, 1334 (7th Cir. 1996); *Fielder* v. *UAL Corp.*, 218 F.3d 973, 985 (9th Cir. 2000), petition for cert. pending, No. 00-1397; *Gunnell* v. *Utah Valley State College*, 152 F.3d 1253, 1264 (10th Cir. 1998). And, as petitioner points out (Pet. 8-9), the Equal Employment Opportunity Commission (EEOC) takes the position that 42 U.S.C. 2000e-3 prohibits any retaliatory conduct that is "reasonably likely to deter protected activity." Pet. 9.

Contrary to petitioner's assertion, however, "'ultimate employment decision' is not the standard in [the Fourth] [C]ircuit." *Von Gunten* v. *Maryland*, No. 00-1058, 2001 WL 273104, at *4 (Mar. 20, 2001). The district court in this case did not adopt that standard or cite any case applying that standard; rather, the court made the general conclusion that "there is no evidence of any adverse employment action" and "the type of actions alleged * * * do not amount to retaliation or retaliatory harassment that can give rise to a cause of action under Title VII." Pet. App. 11-12. Indeed, use of the term "retaliatory harassment" is a recognition that harassment may be the basis for a retaliation claim. The court of appeals then issued an unpublished, per

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(citing *Morris* v. *Oldham County Fiscal Court*, 201 F.3d 784, 791 (6th Cir. 2000)).

curiam opinion that affirmed "on the reasoning of the district court." *Id.* at 2.

The Fourth Circuit's recent opinion in *Von Gunten* v. *Maryland*, *supra*, makes clear that "conduct short of 'ultimate employment decisions' can constitute adverse employment action for purposes of § 2000e-3." 2001 WL 273104, at * 5. Although *Von Guten* recognized that the circuit had "never before expressly so held," *ibid.*, the court explained that its prior decisions had recognized that retaliation claims may be based on actions other than ultimate employment decisions. For example, in *Ross* v. *Communications Satellite Corp.*, 759 F.2d 355, 366 (4th Cir. 1985), the court "recognized that * * * acts of retaliatory harassment, if proved, could constitute adverse employment action" when it remanded retaliatory harassment claims to the district court. *Von Guten*, 2001 WL 273104, at *5 (citing *Ross*, 759 F.2d at 363). Similarly, in *Munday* v. *Waste Management of North America, Inc.*, 126 F.3d 239 (4th Cir. 1997), cert. denied, 522 U.S. 1116 (1998), the court of appeals recognized that retaliatory conduct affecting "the terms, conditions, or benefits" of employment could be actionable under Title VII. *Id.* at 243, cited in *Von Guten*, 2001 WL 273104, at *5.

The *Von Guten* court also explained that *Page* v. *Bolger*, 645 F.2d 227, 233 (4th Cir.) (en banc), cert. denied, 454 U.S. 892 (1981), which petitioner asserts adopted the "ultimate employment decision" standard that the Fifth Circuit follows (Pet. 5 n.6), did not restrict adverse employment actions to the "ultimate employment decisions" of hiring, discharging, promoting, and compensating. 2001 WL 273104, at *6 (quoting *Page*, 645 F.2d at 233). Rather, *Page* explained that retaliation claims could be based on other decisions, including an employee's "entry into training programs."

645 F.2d at 233. The other case that petitioner asserts followed the "ultimate employment decision" standard (Pet. 5 n.6)—*Boone* v. *Goldin*, 178 F.3d 253, 255-256 (4th Cir. 1999)—actually recognizes that non-economic harms, such as level of responsibility, can form the basis for retaliation claims.[3]

Thus, the Fourth Circuit does not follow the "restrictive" (Pet. 5) ultimate employment decision standard that petitioner asks this court to review.

2. In any event, the courts below granted summary judgment on petitioner's retaliation claim for the independent and adequate reason that she failed to create a genuine issue as to whether the alleged adverse employment actions were taken in retaliation for her protected activity. Pet. App. 12. This decision is correct and is not challenged in the petition.

Many of the actions of which petitioner complains date back to before she first contacted an EEO counselor in late 1996. For example, a supervisor notified petitioner about the following decisions before she contacted EEO officials: her non-promotion, the

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[3] *Von Gunten* suggests a potential distinction between the Section 2000e-3 claims at issue in that case and the Section 2000e-16 federal-sector employee claims at issue in *Page* and *Boone*: Because Section 2000e-16 applies only to "personnel actions," the standards for retaliation claims brought under that Section may be different from those brought under the retaliation provision of Section 2000e-3. 2001 WL 273104, at *6 n.3. But see *Brown* v. *Brody*, 199 F.3d 446, 452-453 (D.C. Cir. 1999) (holding that Section 2000e-16 incorporates standards of Section 2000e-3); *Porter* v. *Adams*, 639 F.2d 273, 277-278 (5th Cir. 1981) (same); *Ayon* v. *Sampson*, 547 F.2d 446, 450 (9th Cir. 1976) (same). As discussed *supra* note 1, the courts below evaluated petitioner's claims under Section 2000e-3. Therefore, this case is not the proper vehicle to review *Von Gunten*'s suggestion that different standards may exist in the two provisions.

refusal of special details, and the decision not to allow her to attend certain management seminars. C.A. App. 168, 171-174. None of these actions can therefore be considered retaliation. See *Gibson* v. *Old Town Trolley Tours of Wash., D.C., Inc.*, 160 F.3d 177, 181 (4th Cir. 1998) (defendant's action could not possibly have been motivated by an EEOC complaint that had not yet been filed); *Fennell* v. *First Step Designs, Ltd.*, 83 F.3d 526, 536 (1st Cir. 1996) (decision to terminate plaintiff made prior to her EEO activity could not constitute retaliation even though decision was arguably not final at the time of plaintiff's complaint).

In addition, the USPS identified non-retaliatory reasons for the relevant supervisory decisions. For example, Elyea explained that petitioner was not allowed to act as a temporary manager in his stead because she was not a group leader and did not have the necessary qualifications and familiarity with the department. See C.A. App. 173. Indeed, petitioner admitted in an e-mail that she was unfamiliar with the functions she would have to oversee. *Id.* at 130. In another example, USPS adduced evidence to show that petitioner was denied attendance at management seminars because she was needed in her current position, the department's budget could not accommodate the cost of the seminars, and because she had not defined her career goals in a way that justified the training. *Id.* at 77, 90-91, 120, 128-129. In response, petitioner failed to create a genuine issue of material fact that these non-discriminatory reasons were pretexts for retaliation. Without any evidence that the USPS's explanations were pretextual, the district court properly granted summary judgment. See, *e.g.*, *Karpel* v. *Inova Health Sys. Servs.*, 134 F.3d 1222, 1228-1229 (4th Cir. 1998); *Essex* v. *United Parcel Serv., Inc.*, 111 F.3d 1304, 1308-

1310 (7th Cir. 1997) (citing *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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